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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

RAILWAY EXPRESS AGENCY, INC.,
Petitioner,

vs.

GLYNN C. MALLORY,
Respondent

REPLY BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

Respondent was an employee of petitioner at its Natchez, Mississippi, office. He had been employed by petitioner for nine years, but for a period of from two to three years prior to the injury to his back he was employed as cashier and had the duties of keeping records and of shipping money and receipting for money shipments to Natchez, Mississippi. Money shipments were made in burglar and fire proof safes made to lie flat on back and having a door on top. These safes weighed about 360 pounds each and were about 24 inches long, 15 inches wide and 17 inches high. The safe about which respondent complained was numbered 368. It had a handle on one end, but the handle on the other end was missing. Respondent complained that

from the time he took over the duty of shipping the money, over a period of two or three years, the combination or opening mechanism of safe Number 368 would not open while lying on its back. Respondent knew the combination and tried often to open the safe while it was on its back but the door would not open. In order to make the combination work he found it necessary to stand the said safe on its end. In that position he could open the safe. He made frequent complaints to his superior, the agent at Natchez, Mississippi, that the opening mechanism was out of order, that the safe could not be opened without standing it on its end and that the safe was too heavy for one man to lift. The agent had often promised that he would see about it, or do something about it, but nothing was ever done. Finally, a few days before his injury, respondent made a complaint and the agent threatened to replace him if he didn't lift the safe, get the money and quit coming to him with complaints. Respondent was weak with a stomach disorder which was prevalent in Natchez at the time and had requested the agent to get someone to relieve him but the agent did not comply with his request. Fearing that he would be replaced, he made no further request for help and on February 14, 1945, while lifting the said safe up on one end for the purpose of opening it and making a money shipment, he felt a sharp pain in his back and later was found to have a ruptured intervertebral disc with severe injury to the muscles and nerves of his back.

The safe had to be lifted at the end which did not have a handle in order that the combination or dial would be upright so one could read it.

Respondent's testimony was convincing and although the petitioner's agent and four or five other employees denied that the safe was out of order and three witnesses denied that the safe had been repaired, the jury believed respondent's testimony and found by its verdict that petitioner was

negligent in that it failed to use reasonable care to repair the safe so as to make it unnecessary to lift the safe in order to open it, or in failing to use reasonable care to furnish reasonably safe means and methods for respondent to perform his work, or in failing to use reasonable care to furnish a sufficient number of men for necessary lifting.

The Court's charge to the jury was a proper statement of the law applicable in this cause and covered other points in issue as well as the two mentioned and relied on by petitioner. It was a fair statement of the law and petitioner took no exceptions. The Court's charge to the jury is found in the Record, pages 202-207, inclusive.

At the end of the testimony on behalf of respondent, petitioner moved for a directed verdict. The Court overruled the motion saying that it was a question for the jury. See Record 103. At the conclusion of all of the testimony the Court overruled another motion for a directed verdict and submitted the case to the jury on the several points in issue as stated in the Court's charge. After the verdict, petitioner filed a motion for judgment *non obstante veredicto* and in the alternative a motion for a new trial. See Record, 210-212, inclusive.

On August 7, 1947, the Court signed the following order:

> "Came on to be heard the Motion of the Defendant for judgment not withstanding the verdict of the Jury and also the Motion of the Defendant for a new trial and the Court having considered both Motions is of the opinion that same should be overruled.
>
> It is therefore Ordered by the Court that the Motions of the Defendant for Judgment or for a new trial be and the same are both hereby overruled.
>
> Ordered this the 7th day of August, 1947.
>
> (Sgd.) S. C. Mize,
> *U. S. District Judge.*"

See Record, pages 215-216. The opinion of the Court is in the Record on pages 214 and 215. The letter of the Dis-

trict Judge addressed to the attorneys of record is in the Record on pages 213 and 214.

On August 14, 1947, petitioner gave notice of appeal. See Record, page 216.

This case is reported as follows: *Railway Express Agency, Inc.* v. *Mallory*, 168 Fed. 2d 426.

Argument

Petitioner says that the opinion of the Circuit Court of Appeals in this cause is in conflict with the holding of the Supreme Court of the State of Mississippi and cites *Columbus and Greenville Railroad Co.* v. *Coleman*, 172 Miss. 514, in which the Court held that the mere assertion by a witness that something was out of order, or that the instrumentality furnished him by the master would not work, is not sufficient to afford a basis for a recovery against the master. In that case there was no proof of negligence of the master causing or contributing to the injury of the servant. There was no proof that the master had notice of the defect in the coupling between the motor car and the trailer. In this cause, however, the respondent had repeatedly notified the petitioner that there was a defect in the opening mechanism of the safe. The respondent had no way of knowing why the safe would not open while lying on its back. The petitioner had the means of finding the defect and repairing it but negligently failed to do so. In this instance it is foolish to argue that respondent failed to point out what was wrong on the inside of the dial or opening mechanism. Negligence was proved in that the master, after having repeated notice, failed to use reasonable care to remedy the defect and required the servant to continue using the safe in its defective condition, which necessitated lifting it on its end to make the tumblers in the opening mechanism fall in proper place for opening. The dissenting opinion suggested that defec-

tive eyesight might have been the reason why the respondent could not open the safe while lying on its back. No complaint was made by the petitioner that respondent's eyesight was bad. His work was admitted to be satisfactory. He had no trouble in opening any of the other similar safes being used by the petitioner.

We submit that there is no conflict between the holding in this cause and the holding of the Supreme Court of the State of Mississippi in *Columbus and Greenville Railroad Co.* v. *Coleman*, 172 Miss. 514, or in similar cases.

In *Texas Co.* v. *Hood et al.*, 161 Fed. 2d 618, the Circuit Court of Appeals of the Fifth Circuit held that the verdict and judgment was predicated on conjecture alone, based on a pyramiding of inferences which is not permissible under Texas law. That case presents no conflict with the opinion of the Court in this Cause. In this Cause the negligence of the petitioner was proved by the positive, clear and impressive statement of facts by the respondent. There was no necessity of drawing an inference from circumstances. The jury was required to decide the issues on the positive testimony of respondent and the negative testimony of petitioner's witnesses. The credibility of the witnesses was for the jury to determine. Petitioner's witnesses testified that the safe had not been repaired between the time of respondent's injury and the time of the trial. The jury of course, knew that the safe was not in the care of these witnesses at all times, and could have been repaired without their knowledge. The agent may have been biased by the fact that if negligence were admitted or proved he would be in danger of losing his position. The jury was under no legal compulsion to believe these witnesses, and had a right to infer that the safe had been repaired without the knowledge of the witnesses for petitioner.

The opinion of the Circuit Court of Appeals is not in conflict with the decisions of the Supreme Court of the United States as in the case of *Pennsylvania R. Co.* v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819. In that case the Court said:

> "It, of course, is true, generally, that where there is a direct conflict of testimony upon a matter of fact, the question must be left to the jury to determine, without regard to the number of witnesses upon either side. But here there really is no conflict in the testimony as to the facts."

There was a plain conflict of testimony in this case, and therefore it was a proper case for the jury to decide.

Petitioner makes the statement that the testimony of its witness was undisputed, uncontradicted and positive that the safe was in the same condition at the time of trial as at the time of respondent's injury. Their testimony was in direct contradiction with the positive testimony of the respondent. Furthermore, their testimony was of a negative nature, and may have been inspired by their desire to keep in good standing with their employer.

The jury exercised its sound discretion in judging as to the credibility of the witnesses and the weight of the testimony. This the jury had both a right and a duty to do. It is not the function of an appellate court to weigh conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See *Lavender* v. *Kurn,* 327 U. S. 645, 652, 66 S. Ct. 740, 744.

Petitioner states that the decision of the Circuit Court of Appeals is erroneous in that the Circuit Court of Appeals recognizes that the verdict and judgment is erro-

neous but that a majority of the Judges hold that there is no relief. In their opinion the Circuit Court of Appeals said:

> "There was testimony from which the jury would have been amply justified in finding for the defendant Express Company; on the other hand, if the plaintiff's was believed, the jury could find the facts as the plaintiff related them.
>
> While an examination of the record in this case has led to the conclusion that the trial judge might very properly have granted appellant's motion for a new trial, we do not find that he failed to exercise his discretion, nor can we say that his denial of the motion was an abuse of his discretion. In the alternative, the lower Court might properly have required a remittitur, again a matter of discretion. But there are present none of the special circumstances which would subject the action of the Court below to the review of this Court." Record p. 223."

There is no recognition or error, but, rather, of the fact that there was no error apparent in the trial of this Cause. The fact that Judge might have decided the case differently does not render the jury verdict erroneous.

Petitioner states that the decision of the Circuit Court of Appeals is erroneous in that it failed to pass upon the question as to whether the District Judge was in error in not considering and passing upon the motion for a new trial filed by petitioner. The order overruling petitioner's motion specifically states that the Court considered both motions and that the "Motions of the Defendant for Judgment or for a new trial" are overruled (R. 216). The letter of the District Judge, dated August 7, 1947, and filed August 9, 1947, says that he considered the case very carefully and reached the conclusion that the verdict of the jury must stand and that he thinks there was an issue of fact for the jury (R. 215-216).

Respondent's testimony made a clear case for the jury. The jury by its verdict found the testimony of respondent and the witnesses in his behalf to be more worthy of belief than the testimony on behalf of petitioner. The trial Judge held correctly that the testimony for the respondent is sufficient on which to base the verdict of the jury and that in view of the plain contradiction of the testimony for and the testimony against respondent, it was for the jury to decide. The Circuit Court of Appeals was correct in saying that the record shows no error, and that "there are present none of the special circumstances which would subject the action of the Court below to review by this Court."

We submit that it is clear that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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R. M. KELLY,
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ROSS R. BARNETT,
Jackson, Mississippi,
Counsel for Respondent.

Certificate

I, Ross R. Barnett of Counsel for Respondent, hereby certify that I have this day personally delivered to James L. Byrd of Counsel for Petitioner a copy of the foregoing Answer of Respondent and Reply Brief.

This 20 day of August, 1948.

ROSS R. BARNETT.